

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Respondent,

v.

LUIS MENDOZA-MORALES,

Petitioner.

NO. CR-02-0208-EFS  
[NO. CV-05-0268-EFS]

**ORDER DENYING IN PART &  
HOLDING IN ABEYANCE IN  
PART PETITIONER'S MOTION  
UNDER 28 U.S.C. § 2255 TO  
VACATE SENTENCE**

BEFORE THE COURT without oral argument are Petitioner Luis Mendoza-Morales' Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, (Ct. Rec. 43), and Motion for Appointment of Counsel, (Ct. Rec. 44). Upon receipt of a 28 U.S.C. § 2255 habeas petition, the district court is required to review the motion, files, and records, to determine whether they "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255 ¶ 2. After conducting this review, the Court determines Mr. Mendoza-Morales conclusively is not entitled to relief under his *Booker* claim; thus, Petitioner's petition is denied in part (*Booker* claim) and held in abeyance in part (ineffective assistance of counsel claim) and his Motion for Appointment of Counsel is denied.

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1 **A. Background**

2 The Indictment, filed August 2, 2002, charged Mr. Mendoza-Morales  
3 with Alien in the United States following Deportation in violation of 8  
4 U.S.C. § 1326, (Ct. Rec. 1). Mr. Mendoza-Morales entered a guilty plea  
5 to the Indictment pursuant to a Plea Agreement on August 19, 2003. (Ct.  
6 Recs. 23 & 24.) On December 19, 2003, the Court sentenced Mr. Mendoza-  
7 Morales to seventy-seven months, with two years of supervised release to  
8 follow. (Ct. Recs. 32 & 33.) Thereafter, Mr. Mendoza-Morales appealed  
9 his sentence, (Ct. Rec. 34). On July 15, 2004, the Ninth Circuit denied  
10 his appeal, affirming the district court's sentence, (Ct. Rec. 42). On  
11 September 2, 2005, Mr. Mendoza-Morales filed the instant habeas petition,  
12 challenging the constitutionality of his sentence on the grounds that the  
13 district court increased his U.S. Sentencing Guideline range based on  
14 facts not proven to a jury and contending he received ineffective  
15 assistance of counsel.

16 **B. 28 U.S.C. § 2255**

17 Section 2255 of United States Code title 28 allows a prisoner in  
18 custody to attack a sentence on the grounds such sentence was imposed in  
19 violation of the federal constitution or law, the court did not have  
20 jurisdiction to impose such a sentence, the sentence was in excess of the  
21 maximum authorized by law, and/or otherwise subject to collateral attack.  
22 28 U.S.C. § 2255. Yet, in order to bring such a suit, the petitioner  
23 must file suit within a year of:

- 24 (1) the date on which the judgment of conviction becomes final;  
25 (2) the date on which the impediment to making a motion created  
26 by governmental action in violation of the Constitution or laws  
of the United States is removed, if the movant was prevented  
from making a motion by such governmental action;

1 (3) the date on which the right asserted was initially  
2 recognized by the Supreme Court, if that right has been newly  
3 recognized by the Supreme Court and made retroactively  
4 applicable to cases on collateral review; or  
5 (4) the date on which the facts supporting the claim or claims  
6 presented could have been discovered through the exercise of  
7 due diligence.

8 *Id.* ¶ 6. In regards to subsection (1), the U.S. Supreme Court ruled, for  
9 purposes of habeas review, a conviction is final when "a judgment of  
10 conviction has been rendered, the availability of appeal exhausted, and  
11 the time for a petition for certiorari elapsed or a petition for  
12 certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6  
13 (1987). The Supreme Court clarified, "for the purpose of starting the  
14 clock on § 2255's one-year limitation period, . . . a judgment of  
15 conviction becomes final when the time expires for filing a petition for  
16 certiorari contesting the appellate court's affirmation of the  
17 conviction." *Clay v. United States*, 537 U.S. 522, 525 (2003). Supreme  
18 Court Rule 13 provides "a petition for a writ of certiorari to review a  
19 judgment in any case . . . is timely when it is filed with the Clerk of  
20 this Court within 90 days after entry of the judgment."

21 Mr. Mendoza-Morales appealed the district court's sentence, and on  
22 July 15, 2004, the Ninth Circuit entered a judgment affirming the  
23 conviction. (Ct. Rec. 42.) Mr. Mendoza-Morales did not appeal the Ninth  
24 Circuit's decision. Accordingly, the Court finds the statute of  
25 limitations for Mr. Mendoza-Morales to file his § 2255 habeas petition  
26 began to run on October 12, 2004, - 90 days following the entry of the  
Ninth Circuit's judgment. Therefore, the Court finds Mr. Mendoza-  
Morales' habeas petition, filed on September 2, 2005, to be timely.

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1 **C. Claim 1: *United States v. Booker***

2 Mr. Mendoza-Morales "challeng[es] the constitutionality of [his]  
3 sentence which was imposed under the U.S. sentencing guidelines which are  
4 now advisory without consideration of factors pursuant to 18 U.S.C. [§]  
5 3553(a)." (Ct. Rec. 43.) Although Mr. Mendoza-Morales did not cite to  
6 *United States v. Booker*, 125 S. Ct. 738 (2005), the Court understands Mr.  
7 Mendoza-Morales to be relying upon the principles set forth by the U.S.  
8 Supreme Court in *Booker*. As explained below, given that *Booker* was  
9 decided following Mr. Mendoza-Morales' direct appeal, the Court finds Mr.  
10 Mendoza-Morales is not entitled to benefit from *Booker*.

11 Generally, new rules of criminal procedure "will not be applicable  
12 to those cases which have become final before the new rules are  
13 announced." *Teague v. Lane*, 489 U.S. 288, 310 (1989). This bar applies  
14 equally to a federal habeas corpus petitioner who wishes to collaterally  
15 attack his conviction, unless an exception applies. *Id.* at 311. An  
16 exception applies if the analysis set forth by the Supreme Court in  
17 *Teague* is satisfied. *Id.*

18 "Under *Teague*, the determination whether a rule of criminal  
19 procedure applies retroactively to a case on collateral review requires  
20 a three-step inquiry." *Beard v. Banks*, 124 S. Ct. 2504, 2510 (2004).  
21 First, the Court must determine if Mr. Mendoza-Morales' conviction became  
22 final prior to the Supreme Court's decision in *Booker*. *Id.* Second, the  
23 Court must determine whether the rule announced in *Booker* qualifies as  
24 a "new rule." *Id.* Third, if those two conditions are satisfied, the  
25 Court examines whether the new rule falls within one of *Teague's* two  
26 narrow non-retroactivity exceptions: (1) whether the new rule is

1 "substantive," i.e. forbids punishment of certain primary conduct or  
2 prohibits a certain category of punishment for a class of defendants  
3 because of their status or offense, or (2) whether the new rule is a  
4 "watershed rule of criminal procedure implicating the fundamental  
5 fairness and accuracy of the criminal proceeding." *Id.* at 2513.

6 In regards to the first prong, the Court already determined Mr.  
7 Mendoza-Morales' conviction became final on October 12, 2004, - several  
8 months before the Supreme Court issued its decision in *Booker* on January,  
9 12, 2005. Thus, the first *Teague* prong is satisfied.

10 As to the second prong under *Teague*, the Court finds *Booker* clearly  
11 establish a new rule. In general, "a case announces a new rule if the  
12 result was not dictated by precedent existing at the time the defendant's  
13 conviction became final." *Teague*, 489 U.S. at 301. Prior to *Booker*,  
14 *Apprendi v. New Jersey*, 530 U.S. 466 (2000), established a federal judge  
15 at sentencing could enhance a sentence based on facts not admitted by the  
16 defendant or found by the jury, so long as the enhancement did not  
17 increase the defendant's sentence beyond the prescribed statutory  
18 maximum. *Apprendi*, 530 U.S. at 490. In *Washington v. Blakely*, 124 S.  
19 Ct. 2531 (2004), the Supreme Court applied *Apprendi* to Washington's  
20 sentencing scheme, stating "'the statutory maximum' for *Apprendi* purposes  
21 is the maximum sentence a judge may impose *solely on the basis of the*  
22 *facts reflected in the jury verdict or admitted by the defendant.*"  
23 *Blakely*, 124 S. Ct. at 2537 (emphasis in original). Thereafter, in  
24 *Booker*, the Supreme Court concluded "the Sixth Amendment as construed in  
25 *Blakely* does apply to the [Federal] Sentencing Guidelines." *Booker*, 125  
26 S. Ct. at 746.

1 Every court of appeals to consider the question has concluded the  
2 rule set forth in *Booker* is new. For instance, the Sixth Circuit  
3 concluded "[t]he *Booker* rule is clearly new. It was not dictated by  
4 precedent existing at the time [the defendant's] conviction became final,  
5 and it would not have been apparent to 'all reasonable jurists.'" *Humphress v. United States*, 398 F.3d 855, 861 (6th Cir. 2005). The Sixth  
6 Circuit also noted that prior to *Booker*, "the federal judiciary [had]  
7 been deeply divided on the issue of whether the rule announced in *Blakely*  
8 [applied] to the Federal Guidelines lends further support to the  
9 conclusion that *Booker* announced a new rule." *Id.* This finding was  
10 echoed by the Second Circuit. *Guzman v. United States*, 404 F.3d 139, 142  
11 (2d Cir. 2005) ("It cannot be said that the result in *Booker* was apparent  
12 to 'all reasonable jurists' . . . *Booker* announced a new rule"). The  
13 Court agrees with the trend of the Circuits.<sup>1</sup>

15 Since Mr. Mendoza-Morales' conviction became final prior to the  
16 *Booker* decision and because *Booker* qualifies as a new rule, the Court  
17 must determine whether this new rule falls within the two exceptions to  
18 non-retroactivity. First, the Court finds *Booker* did not create a new  
19 "substantive" rule, as it did not add or remove any conduct from the  
20 realm of criminal offenses. See *Schardt*, 414 F.3d at 1036; *Teague*, 489  
21 U.S. at 307.

22 Second, the Court finds the procedural new rule established in  
23 *Booker* does not amount to a "watershed rule of criminal procedure

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24 <sup>1</sup> The Ninth Circuit has not addressed whether *Booker* qualifies as  
25 a new rule; however, in *Schardt v. Payne*, 414 F.3d 1025, 1035 (9th Cir.  
26 2005), the Ninth Circuit ruled that *Blakely* created a new rule.

1 implicating the fundamental fairness and accuracy of the criminal  
2 proceeding." *Beard*, 124 S. Ct. at 2513.<sup>2</sup> The Court finds the Seventh  
3 Circuit's discussion on this point cogent:

4 [t]he [U.S. Supreme] Court held in *DeStafano v. Woods* and  
5 reiterated in *Summerlin*, that the choice between judges and  
6 juries as fact finders does not make such a fundamental  
7 difference; to the contrary, the Court stated in *Summerlin*, it  
8 is not clear which is more accurate. What is more, *Booker* does  
9 not in the end move any decision from judge to jury, or change  
10 the burden of persuasion. The remedial portion of *Booker* held  
11 that decisions about sentencing factors will continue to be  
12 made by judges, on the preponderance of the evidence, an  
approach that comports with the sixth amendment [sic] so long  
as the guideline system has some flexibility in application.  
As a practical matter, then, petitioners' sentences would be  
determined in the same way if they were sentenced today; the  
only change would be the degree of flexibility judges would  
enjoy in applying the guideline system. That is not a  
"watershed" change that fundamentally improves the accuracy of  
the criminal process.

13 *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005) (citations  
14 omitted). Furthermore, the Supreme Court specifically stated in *Booker*  
15 its holding applied "to all cases on *direct review*." *Booker*, 125 S. Ct.  
16 at 769 (emphasis added). This statement evidences the Supreme Court's  
17 intent to not apply *Booker* retroactively to cases on collateral review.  
18 For these reasons, the Court concludes *Booker* does not retroactively

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24 <sup>2</sup> The Supreme Court previously noted the narrowness of this  
25 exception, stating it has "yet to find a new rule that falls under the  
26 *Teague* exception." *Beard*, 124 S. Ct. at 2513-14.

1 apply to Mr. Mendoza-Morales' sentence.<sup>3</sup> Accordingly, the Court denies  
2 Mr. Mendoza-Morales' habeas petition in part.

3 **D. Ineffective Assistance of Counsel**

4 Mr. Mendoza-Morales also claims "ineffective assistance of counsel."  
5 This claim was not supported by any facts. Accordingly, the Court is  
6 uncertain as to what assistance by counsel Mr. Mendoza-Morales is  
7 claiming was ineffective. No later than October 21, 2005, Mr. Mendoza-  
8 Morales shall provide a basis for this claim. **Mr. Mendoza-Morales is**  
9 **warned that failure to respond by October 21, 2005, will result in the**  
10 **denial of his remaining habeas petition.** In addition, the Court cautions  
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12 <sup>3</sup> While the Ninth Circuit has ruled that *Blakely* is not  
13 retroactive, see *Schardt v. Payne*, 414 F.3d 1025, 1036 (9th Cir. 2005)  
14 (initial petition); *Cook v. United States*, 386 F.3d 949, 950 (9th Cir.  
15 2004) (successive habeas petition); the Ninth Circuit has yet to rule on  
16 the retroactive application of *Booker*. However, the Court's conclusion  
17 that *Booker* does not apply retroactively to criminal cases that became  
18 final before January 12, 2005, is consistent with rulings of the federal  
19 circuit court of appeals that have addressed this issue. See, e.g.  
20 *Cirilo-Munoz v. United States*, 404 F.3d 527, 533 (1st Cir. 2005); *Guzman*  
21 *v. United States*, 404 F.3d 139, 144 (2d Cir. 2005); *In re Elwood*, 408  
22 F.3d 211, 213 (5th Cir. 2005); *Humphress v. United States*, 398 F.3d 855,  
23 860 (6th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th  
24 Cir. 2005); *Varela v. United States*, 400 F.3d 864, 868 (11th Cir. 2005).  
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1 Mr. Mendoza-Morales that § 2255 places a restriction on second or  
2 successive habeas petitions.

3 For the above reasons, **IT IS HEREBY ORDERED:**

4 1. Mr. Mendoza-Morales' Petition Under 28 U.S.C. § 2255 to Vacate,  
5 Set Aside, or Correct Sentence by a Person in Federal Custody, (**Ct. Rec.**  
6 **43**), is **DENIED IN PART** (*Booker*-related claim) and **HELD IN ABEYANCE IN**  
7 **PART** (ineffective assistance of counsel claim) **until October 21, 2005.**

8 2. Mr. Mendoza-Morales' Motion for Appointment of Counsel, (**Ct.**  
9 **Rec. 44**), is **DENIED**, given that the Court has not determined that an  
10 evidentiary hearing is warranted at this stage. Rule 8(c) foll. 28  
11 U.S.C. § 2255.

12 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
13 this Order and provide a copy of this Order to Defendant/Petitioner at  
14 the following address:

15 Luis Mendoza-Morales  
16 Reg. No. 10699-085  
17 Benton County Corrections  
18 Building B, Pod 303-1  
7122 W. Okanogan Place  
Kennewick, WA 99336

19 **DATED** this 16th day of September, 2005.

20  
21 s/Edward F. Shea  
EDWARD F. SHEA  
22 United States District Judge  
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